Supreme Court, U.S.
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No. 88-1483

In The

Supreme Court of the United States

October Term, 1988

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

Petitioner,

v.

DAVID T. JORDAN

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

William C. Partin
Attorney of Record
Matt Partin
Partin & Partin
1310 Carondelet Drive
Suite 330
Kansas City, Missouri 64114
(816) 942-7880
Attorneys for Respondent

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QUESTIONS PRESENTED

Respondent is not satisfied with Petitioner's statement of the questions presented. In accordance with Supreme Court Rule 34.2, Respondent states the following questions which were overlooked by Petitioner and must be taken up before Petitioner's questions.

A. WAS THE PETITION FOR CERTIORARI TIMELY FILED UNDER SUPREME COURT RULE 20.4?

B. CAN CLAYTON BE GRANTED CERTIORARI ON QUESTIONS AND ISSUES THAT IT HAS NEVER PREVIOUSLY RAISED (OR HAS EXPRESSLY WAIVED) IN THE COURTS BELOW: QUESTION 1, THE 8TH AMENDMENT EXCESSIVENESS ISSUE; QUESTION 3, THE DUE PROCESS/EQUAL PROTECTION BIFURCATION ISSUE; AND QUESTION 4, THE COMMODITY EXCHANGE ACT PREEMPTION ISSUE?

C. (a) DOES THE 7TH AMENDMENT PROHIBIT THIS COURT FROM REVIEWING ANY QUESTION INVOLVING THE SIZE OF A JURY'S DAMAGES AWARD, AND IF NOT, (b) WERE THE FRALOFF AND SUCCEEDING CASES - WHICH HELD TO THAT VERY EFFECT - WRONGLY DECIDED, AND (c) MUST THEY NOW BE OVERRULED?

D. (a) DO THE PROHIBITIONS AND PROTECTIONS OF THE 8TH AMENDMENT'S EXCESSIVE FINES CLAUSE EXTEND TO THE STATES AND THEIR CITIZENS THROUGH THE 14TH AMENDMENT'S DUE PROCESS CLAUSE, AND IF NOT, (b) IS A CASE REQUESTING REVIEW OF A JURY'S PUNITIVE DAMAGES AWARD AN APPROPRIATE VEHICLE FOR MAKING SUCH AN EXTENSION, ESPECIALLY IN LIGHT OF THE LONG LINE OF DECISIONS BY THIS COURT CONFINING THE 8TH AMENDMENT'S REACH TO CRIMINAL MATTERS?

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STATEMENT OF CASE

Respondent is not satisfied with Clayton's Statement because it presents a grossly distorted picture of the case through extensive misstatements or omissions of fact and makes what Clayton knows are false statements in an effort to hide the failure to raise questions 1, 3 and 4 in the Courts below. Therefore, pursuant to Supreme Court Rule 34.2, a correct Statement follows.

Parties And Claims

Plaintiff David T. Jordan, a retired accountant in his 70's, sued Defendants Clayton Brokerage Company and Martin Rachlin, the Manager of and a broker in the Kansas City office, where Plaintiff had an account (Rachlin had, unknown to his own counsel and everyone else, taken bankruptcy prior to the filing of the suit and eventually had to be dismissed). The gist of the claims submitted to the jury was that Jordan

had been caught in Clayton's longstanding and large scale plan to defraud customers. The first claim - a Merrill Lynch v. Curran implied cause - was for misrepresentation and required the jury to find that Rachlin induced Jordan to give up control over his account by falsely representing that the account would be traded pursuant to certain stated strategies, when Rachlin knew that the account would be handled according to the plan. Instruction No. 8. The second claim - a Missouri common law claim - was for breach of fiduciary duties and required the jury to find that Mr. Jordan's account was actually handled "in accordance with a plan designed to produce commissions and profits through excessive trading and switching of orders". Instruction No. 9. Having made the findings required by each instruction, the jury found Mr. Jordan's actual damages to be $7,923.50 and assessed punitive damages of $400,000.00. Judge

Bartlett found that the $400,000 award was proportioned to the malice in Clayton's conduct and to Plaintiff's injury and was within Clayton's ability to pay, and the Eighth Circuit affirmed those findings. Jordan, 861 F.2d at 174-77.

Pre-Trial Events

Though suit was filed in December 1982, trial did not take place until November 1986. In that time the case was transferred from Judge Bartlett to Senior Judge Oliver to Judge Bartlett, each time at the judge's instance. Orders 11-30-83, 5-6-85. After (a) ending the first trial with jury selection because he felt he could not rule the admissibility of certain FRE 404(b) evidence offered by Plaintiff to prove the existence of Clayton's plan unless it was all reduced to writing, Order 4-23-85, and (b) compelling the parties to reduce that evidence to writing by deposing the witnesses who would present that evidence

(which Plaintiff had chosen not to do because all the witnesses could appear at trial and their testimony was short and simple), id., Judge Oliver retransferred the case, citing his heavy workload. Another trial setting was not obtained until Fall 1986.

On September 25, 1986 Judge Bartlett held oral arguments on the plan evidence's admissibility and rejected Clayton's argument that there would be a "mountain" of such evidence (an argument repeated in Clayton's Petition, p.7, p.15, n.11), ruling that the evidence was admissible subject to various limitations, a ruling affirmed by the Eighth Circuit. Jordan, 861 F.2d at 176-77.

The Trial And Evidence

Trial began on November 10, 1986. The evidence showed that since 1979 Clayton, in the persons of Rachlin and various officers, including the heads of the Compli-

ance and Legal Departments, had carried out a plan for defrauding customers throughout the Midwest, the customers all having accounts in Clayton's Kansas City office. Infra. Testimony from Martha LaQuey, a former Clayton employee who had worked in the Kansas City office, from various employees and officers still at Clayton, and from Plaintiff and other customers, along with Clayton's own records showed that the plan operated as follows. First, the customer was induced to give control or "discretion" over the account to Clayton, by misrepresentations about the trading strategies that would be followed. E.g., T. 468-70, 796, 886-87. Second, though discretion had been obtained and would be exercised, making the accounts discretionary, all documentation would show the accounts as nondiscretionary; later when customers complained about Rachlin's trading of their accounts, Clayton officials would reject the complaints by

pointing to the "nondiscretionary" documentation and telling the customer that he had no basis for complaint because he was obviously doing all the trading himself. Jordan, 861 F.2d at 174. Third, the discretion would be used to trade the accounts excessively and without any rational strategy, for the sole purpose of generating commissions, id., 174, with 60% of the commissions going to Clayton and 40% to Rachlin. Fourth, the discretion was also utilized to switch orders (i.e., "open" positions or contracts which had not yet been matched with corresponding contracts to create a "trade") from one account to another, id.; by watching the markets' price movements it was possible for a broker to determine whether an open position would -if closed in the near future - produce a profit or a loss. Orders that would produce a profit were switched out of customers' accounts and into accounts that Rachlin

controlled through a confederate or owned under a fictitious name. Id., 174. Such orders could also be switched into the account of a customer who had suffered large losses due to the aimless excessive trading; the resulting profit would both placate the customer and allow more excessive trading. Id. Fifth, customer complaints to Rachlin were met by more misrepresentations about trading strategies and by assurances that those strategies would recoup past losses. Id. Finally, Clayton management protected Rachlin, covered up the plan and helped fend off customer complaints. Id., 174, 175-76, and infra. Illustrative of the coverup was the response of Clayton's management to "whistleblowing" by employees or ex-employees from the Kansas City office. When customer complaints in early 1980 prompted James Hanson (then-Manager of the K.C. office) to investigate Rachlin's conduct, conclude that Rachlin was defrauding custom-

ers and report that to management, Clayton removed Hanson as Manager and replaced him with Rachlin. Id., 175. And when in August 1980 Rachlin's ex-assistant, Martha LaQuey (fired by him for refusing to cooperate with the plan) reported the order-switching and the names of some Rachlin confederates to the #2 man in the Compliance Department (T.404-05) and he passed that on to the head of the Department (id., 176), nothing happened; six months later David Jordan's account would be caught up in the order-switching. Customer complaints had to be handled, too, as was exemplified by Ellen O'Connell's complaints. Though in mid-1980 she twice complained directly to Clayton's General Counsel that Rachlin took control of her accounts, was excessively trading them and ignoring her directions to stop (T.827-28, 835), and though Clayton's records showed extensive switching of orders into and out of her accounts (which could only

occur when the broker had control over the trading T.754-56), Rachlin was not stopped or disciplined and Compliance rejected her complaints by asserting that she, not Rachlin, did all the trading. T.844-45, 853-57; Ex.381. (Though a number of the customers who testified at trial, including Mrs. O'Connell, had complained to the CFTC, T.858, 904, no CFTC investigation ever took place.)

The tactics of management and Rachlin were extraordinarily successful; by the time Clayton took control over Mr. Jordan's account (January 1981) the plan had been in operation for two years. Jordan was induced by a series of misrepresentations about market trends, the planned trading strategy, and the profitability of that strategy to give discretion over his account to Clayton. Instr.8; T. 464-72. Though Clayton thus gained discretion over Jordan's account, its records continued to show the

account to be nondiscretionary. Ex.3. That notwithstanding, Rachlin immediately began trading at his discretion; in the five-six weeks he traded the account, his aimless excessive trading wiped out the approximately $7,000 balance, required Jordan to pay a $970 margin call and generated $5,292 in commissions. Jordan, 173, 175-76. An expert witness described the trading as following no strategy, except to make as many trades as possible, most of them day-trades, and stated that such an approach was "a doomed strategy" in which the "customer can't come out ahead", the heavy drain of commissions requiring a monthly profit of 182% merely to pay off the commissions and leave the account at a break-even point. Id., 175-76. That trading was supplemented and furthered by order-switching. Infra.

When Rachlin's excessive trading left the account with a negative balance after only two weeks, three orders that

would produce profits were switched into the Jordan account from other customers' accounts, wiping out the negative balance and allowing the trading to continue, Jordan, 173; the trading that followed generated an additional $2,300 in commissions. Days later two orders that would produce profits were switched out of Jordan's account and into an account Rachlin owned under the fictitious name "Xochilt Flores". Id., 173, n.1; Exs.15, 40d. None of that was known by Jordan because the trading records Clayton furnished to customers did not show that orders had been switched into or out of his account. Jordan, 173. It was known to Clayton management. Compliance Department employee Bradac learned of the "Flores" account well before the end of the trading in Jordan's account and again informed the head of the Department, but all that was concealed from Jordan. T.204-05, 547-49. All told, David Jordan lost $7,923.50.

That was a substantial injury to Jordan because he was retired and had a net worth of only slightly over $100,000 (T. 602); the loss represented some 7-8% of his net worth. (Clayton put Jordan's net worth into evidence, id., and later did not object but consented to admission of evidence of its net worth, id., 972; both figures were pertinent to calculation of any punitive damages award). The jury's verdict was returned on November 24, 1986.

Preservation Of Questions 1, 3 and 4; Post-Trial Proceedings

After the jury returned its verdict, Clayton's post-trial motions were duly filed. App., 15-26. They raised none of the issues presented here by Clayton's questions 1, 3 and 4 - those questions were not raised at all in the District Court, nor in the Eighth Circuit. Question 1's assertion that the punitive damages award was excessive under the 8th Amendment was eschewed by Clayton in both the Courts below in favor of

an argument based on Missouri's common law, App. 16-17 (post-trial motion); Jordan, 174-77; the Eighth Circuit expressly held that Clayton did not raise the 8th Amendment argument or any of the other arguments from Banker's Life. Jordan, 178.

Nor was question 3's argument about Clayton's net worth evidence raised either; as already noted, Clayton consented to its admission. Near the close of his case Plaintiff proposed to read to the jury Clayton's total assets and liabilities and its net worth ("stockholders' equity"). Clayton objected to the former but squarely agreed to the latter:

> "Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury".

T.972 (and see, 976; pages 972-76 are set out in the Appendix, 68-74). And when the figure was read to the jury, Clayton made no objection. T.1003; App.75. Only in the

instruction conference did Clayton first venture an objection to the net worth evidence, asserting that it was never admissible under the Equal Protection Clause because it might move the jury to more severely punish the defendant than "another defendant under similar circumstances who has a net worth that is less than this defendant's". T.1062, App., 76-77 (Clayton's objection in Instruction Conference). But Clayton did not move to strike the net worth evidence to whose admission it had agreed or request a withdrawal instruction, id., and though its objection anticipated Plaintiff's reference in closing argument to that evidence (id.), Clayton made no objection when that reference came. T.1097-98; App. 77-78. In its post-trial motions Clayton stuck with its Equal Protection argument, App.18 - and made no mention of bifurcation.

Id. That was likewise true in the Eighth Circuit (Brief of Appellant-Defendant, 45-56; App., 78). Jordan, 177-78.

Finally, preemption was never raised in the Courts below and Clayton does not say it was - though it strives to leave that impression, without actually saying so. Clayton admits that the issue was not raised in the Eighth Circuit (Petition, p.8, n.4) or "pressed" in the District Court (id., 6-7). It does attempt, by clever wordplay, to suggest that preemption was raised in its Answers by first pointing out that the Answers contained the standard boilerplate allegations that the Complaint fails to state a claim, and then stating that preemption was "the basis for that defense" (Petition, 6-7). But Clayton never says preemption was actually mentioned anywhere in any Answer, because it was not; if preemption was "the basis" for the "fails to state a claim" allegation, that was so only

in the scrivener's mind. Preemption is not mentioned in any document filed by Clayton in the Courts below and certainly not in the Answers (all the Answers are in the Appendix, 34-67; no Answer to the original Complaint was filed because Plaintiff amended it pursuant to FRCP 15(a) before an Answer was filed).

ARGUMENT

The last few months' revelations of widespread fraud and criminality in the futures industry confirm what the facts of this case show: too often neither industry members or the CFTC will or can protect investors from fraud or aid them after they have been defrauded. For that reason, and others, Congress has long made sure that private damages actions are available to futures investors. The actual damages such actions provide can compensate investors; the punitive damages can do what Congress is increasingly coming to believe the CFTC

cannot - "punish violators severely enough to deter cheating" (Rep.English, Chairman of Subcommittee investigating futures industry). Yet Clayton's petition asks this Court to gut the remedy of private damages actions by radically changing punitive damages law or by finding preemption of all state common law torts. It would be hard to find a less propitious time for that.

Moreover, Clayton asks this Court for such extraordinary action even though it has failed to timely file its petition (Sec.I) and saw so little merit in the questions it now presents that it chose not to raise or even waived three of those four questions in the Courts below (Sec. II). And it ignored two other crucial questions: whether the 7th Amendment and the Fraloff line of cases prohibit this Court from reviewing the size of a jury's damages award (Sec. III), and whether the Excessive Fines Clause should be applied to the states

through the 14th Amendment (Sec. IV D 1). Thus, it is no surprise that, when considered on the merits, Clayton's questions do not present the requisite "special and important reasons" for certiorari (Secs. IV, V).

I. Clayton's Petition Was Not Timely Filed Under Supreme Court Rule 20.4.

The Eighth Circuit's opinion was issued on October 17, 1988; because Clayton did not file the requisite "petition for rehearing" (instead filing only for rehearing en banc), its certiorari petition was due ninety days later under Supreme Court Rule 20.4. Though the order issued by the Eighth Circuit on December 8, 1988 does purport to deny a petition for rehearing and a petition for rehearing en banc, there simply was no petition for rehearing. In what is apparently an effort to protect unwary prospective certiorari petitioners who seek a rehearing en banc, but not a rehearing, the Eighth Circuit has recently

taken to issuing orders purporting to deny requests for rehearing and for rehearing en banc when only the latter has been requested. E.g., Jackson County Missouri v. Jenkins, No. 88-1228; sub nom. Jenkins by Agyei v. Missouri, 855 F.2d 1295 (8th Cir.1988) (petitions for rehearing en banc denied, 855 F.2d at 1295, 1318-19; when Clerk of Supreme Court indicated by letter to petitioners that petition was not timely because of failure to seek rehearing, Eighth Circuit issued second order denying requests for rehearing and rehearing en banc). Nonetheless, Clayton did not file a "petition for rehearing", which means that its certiorari petition was due on January 17, 1989 - and was thus nearly two months late.

II. Clayton Has Failed To Raise Questions 1, 3 And 4 Of Its Petition At Any Previous Time In This Case And Has Waived Question 3 Of Its Petition In The District Court.

A. **Question 1.**

Until it filed its Petition here Clayton never raised the issue set out in question 1 of that Petition: excessiveness under the Excessive Fines Clause. That was not a mere omission on Clayton's part, but a deliberate tactical choice; rather than challenge the amount of the punitive damages award on constitutional grounds Clayton chose to challenge it on common law grounds.

Thus, in its post-trial motion Clayton asserted that the punitive damages award was excessive under the common law doctrines of simple excessiveness and/or bias, passion and prejudice. App., 16-17. No mention was made of the 8th Amendment. Id. Months later, Clayton did the same thing in the Eighth Circuit. Though its brief mentioned the Banker's Life case and the fact that probable jurisdiction had been noted, and cited the U.S. Law Week report which listed each of the questions raised by

Banker's Life, including the 8th Amendment question, (U.S.L.W. 3600, cited at p.46 of Clayton's "Brief of Defendant-Appellant"), the brief, like the post-trial motions, challenged the size of the award only on the two common law grounds. Id., 27-32 (simple excessiveness), 32-45 (bias, passion and prejudice). When Respondent's brief then pointed out that Clayton did not raise an 8th Amendment challenge, Clayton's reply brief did not demur. Accordingly, after it rejected the two common law challenges to the award, the Eighth Circuit specifically held that Clayton had never raised any of the issues presented by Banker's Life. Jordan, 861 F.2d at 178 ("Thus it is clear that the constitutional challenge to the punitive damages awarded in this case is very different from the challenge the petitioners sought to raise in Banker's Life".) Finally, unlike the Banker's Life

petitioners, Clayton did not attempt to belatedly raise the 8th Amendment issue in its rehearing en banc papers. App., 27-31.

Clayton chose to rely on Missouri's common law rather than the 8th Amendment because it believed that it had a greater chance of success with the common law and, of course, knew that a victory on that ground in the Eighth Circuit would leave Plaintiff little chance of obtaining review in this Court. So, though it mentioned Bankers' Life in its brief by way of suggesting that punitive damages are in some disfavor, it carefully and deliberately refrained from raising any of the constitutional challenges it knew had been belatedly raised there. Jordan, 861 F.2d at 178.

B. Question 3.

Question 3 proposes that the Due Process and Equal Protection Clauses mandate a bifurcated trial in a punitive damages case and allow admission of evidence of the

defendant's net worth only in the second part of the trial. Yet, as Respondent's Statement of the Case has shown, Clayton (a) began the use of such evidence in Plaintiff's case by presenting evidence of his net worth (T.602), (b) expressly consented to admission of its own net worth figure, (c) never requested bifurcation of the trial, and (d) never raised question 3 in either of the Courts below. Statement, supra, pps. 13-14. Thus, Clayton not only failed to raise, but actually waived question 3.

C. Question 4.

Also already shown is that Clayton never raised preemption in the Courts below. Statement, pps. 15-16. That was a tactical choice, reflecting the belief that the issue lacked merit, as Clayton's Petition (6-7) grudgingly admits. Clayton had unsuccessfully raised the issue in a case similar to this one in Kansas City, O'Connell v.

Clayton, No. CV85-12755 (Jackson County, Missouri Circuit Court) (see, App. 32-33) and that defeat coupled with consistent rejections of the argument by Federal Courts - e.g., Patry v. Rosenthal & Co., 534 F.Supp. 545 (D.Kan.1982); Kotz v. Bache Halsey, 685 F.2d 1204 (9th Cir. 1982); Kerr v. First Comm.Corp., 735 F.2d 281 (8th Cir. 1984) - led Clayton to believe that there was no reason to raise the issue.

Conclusion

The failure to raise in the Courts below a question presented in a certiorari petition is ample ground for denial of review. E.g., Miree v. DeKalb County, 433 U.S. 25, 33-34 (1977); Tennessee v. Dunlap, 426 U.S. 312, 316 n.3 (1976). It is certainly ground for denial of certiorari here because Clayton deliberately chose not to raise or even waived the issues presented in questions 1, 3 and 4. Clayton must live with the consequences of its tactical choices and

cannot escape them by hiding the fact - as its Petition attempts to do - that it chose not to raise the issues. The unfairness of that ploy is manifest. Compounding that unfairness is the history of delay that permeates this case. Though Plaintiff's complaint was filed in December 1982, and though all parties were ready for trial in April 1984 at the first trial setting, the case was not actually tried until November 1986. By the time the post-trial motions were ruled, the case had been more than four years in the trial court. Then, arriving in the Eighth Circuit in early 1987, the case spent almost two more years there. Clayton should not now be allowed to extend the case for another year by raising here for the first time questions it chose not to raise or actually waived in the Courts below.

III. The 7th Amendment Prohibits This Court From Considering Any Question Turning Upon The Size Of A Jury's Damages Award.

The 7th Amendment provides in part:

> "(N)o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".

That clause has long been viewed as prohibitory in nature. E.g., Parsons v. Bedford, 3 Pet. 446; 28 U.S. 433, 447-48 (1830). Included among the kinds of review prohibited by the clause is that which Clayton requests in question 1: appellate review of the size of a jury's damages award. E.g., Railroad Co. v. Fraloff, 100 U.S.24, 31 (1879); Southern Ry. v. Bennett, 233 U.S. 80, 87 (1914); Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933); Neese v. Southern Ry. Co., 350 U.S. 77 (1955). In order to provide such review, it will be necessary to overrule the Fraloff line of decisions, a course for which the 8th Amendment provides no support (see, Sec. IV D 2).

IV. Missouri's Law Of Punitive Damages And Clayton's Questions 1-3; The Questions Present No Ground For Granting Certiorari.

A. Missouri Law And Punitive Damages.

Before looking at Clayton's punitive damages questions, it is helpful to briefly review the law on which the jury's punitive damages award was based - Missouri's common law. It points up many of the flaws in Clayton's arguments.

In Missouri punitive damages grew out of compensatory damages. The early punitive damages cases held that malicious conduct removed the strictures governing compensatory damages, including the one limiting damages to the amount of the actual loss:

> "where a trespass is committed in a wanton, rude and aggravated manner indicating malice or a desire to injure, a jury ought to be liberal in compensating the party injured in all he has lost . . . and even this may be exceeded to prevent a repetition of the act".

Walker v. Borland, 21 Mo. 289, 291 (1855) (emphasis added). For that reason punitive damages had an element of compensation, along with elements of punishment and deterrence; in the Supreme Court's words:

> "Where there are no circumstances of aggravation the damages should be compensatory only. Where, however, the act is aggravated and where there has been fraud, oppression, malice or gross negligence, a different rule is adopted and the jury is allowed to award exemplary damages, not only to compensate the sufferer, but also to punish the offender".

Franz v. Hilterbrand, 45 Mo. 121, 123 (1869) (emphasis added). Thus, when in the mid-19th Century, a commentator began to argue in his treatise that punitive damages were criminal in nature - because, so he asserted, punishment was solely the criminal law's province (Greenleaf on Evidence) - the Missouri Supreme Court rejected that argument, turning to the rationale of the early cases which found an element of compensation in punitive damages:

> "But this point has been so firmly established, and so long settled contrary to this view, that it is no longer open to controversy. In all actions of tort, whether for assault and battery, or for trespass or libel or slander, where there are circumstances of oppression, malice or negligence, exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender".

Buckley v. Knapp, 48 Mo. 152, 162 (1871) (emphasis added).

The early cases worked out a detailed and carefully designed series of requirements and rules for (a) proving liability for, and (b) calculating the amount of punitive damages, which are still followed today. Unlike some states which give a rather nebulous definition to "malice", see discussions in Smith v. Wade, 461 U.S. 30 (1983), Missouri precisely defines three different types and degrees of malice, ranging from malice-in-law, to legal malice, to actual malice. E.g., Proctor v. Stevens Employment Services, 712 S.W.2d 684, 686 (Mo.1986). In addition, Missouri re-

quires that the degree of malice needed to establish liability for punitive damages be higher than that needed to establish liability for the underlying tort. Proctor, 712 S.W.2d at 687.

The requirements and rules for calculating the amount of punitive damages (on which Clayton relied in its common law challenges to the punitive damages award) are no less detailed and precise than those for liability, and supply the guidelines which this Court has occasionally worried may be lacking in some other jurisdictions. For example, though the amount of the punitive damages award must, of course, be proportioned to the degree of malice, under Missouri law it must also be proportioned to the plaintiff's injury. Compare, St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351 (Mo. 1937) with Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). And to accomplish that the jury may use the simple objective

standard of what percent of the plaintiff's net worth the actual loss represents, e.g., Beck v. Dowell, 20 S.W. 209, 210 (Mo. 1892); Holcroft v. Mo-Kan-Tex Ry., 607 S.W.2d 158, 164 (Mo.App.1980) - as was done in this case, T.1097-98 (App. 77-78), where Plaintiff lost some 8% of his net worth - and may thus make sure that the punitive damages award does not take a disproportionate percent of the defendant's net worth (2% in this case). Furthermore, the amount of punitive damages must be fitted to the defendant's ability to pay, e.g., Comegys v. Chrysler Corp., 577 S.W.2d 873, 880 (Mo.App. 1980) which also may be measured by the objective standard of percent of net worth, as here. Like some jurisdictions which limit punitive damages awards to a particular percent of the defendant's net worth, e.g., Little v. Stuyvesant Life Ins. Co., 136 Cal.Rptr. 653, 663 (Cal.App. 1976), Missouri closely scrutinizes awards using that

standard. E.g., Lipari v. Volume Shoe Corp., 664 S.W.2d 953, 958 n.2 (and cases cited) (Mo.App.1984); Potter v. Milbank, 489 S.W.2d 197, 207 (Mo.1972). The best measures of both the fairness and the precision and clarity of Missouri's rules for calculation of the amount of a punitive damages award are that (1) though it undoubtedly had in hand Justice O'Connor's concurring opinion in Banker's Life, Clayton has not in any way challenged those rules as imprecise or vague, and (2) Clayton relied primarily on those rules in the Courts below. With that background in place, Clayton's punitive damages questions can now be considered, albeit, in an order slightly different from that followed by Clayton.

B. The Due Process Clause Does Not Require That A Claim For Punitive Damages Under Missouri Law Be Proved Beyond A Reasonable Doubt.

Though Clayton's certiorari papers do not state it with any particularity or identify the constitutional provision it relies on, question 2 seems to invoke the rule that the Due Process Clause requires a matter that is criminal in nature to be proved beyond a reasonable doubt. E.g., In re Winship, 397 U.S. 358 (1970). That is the argument that was raised in cursory fashion in the District Court and Eighth Circuit; in the words of Clayton's Appellant's brief: "(b)ecause punitive damages are by their very nature designed to punish a defendant the only proper burden of proof is proof beyond a reasonable doubt as required by the Due Process Clause of the Fourteenth Amendment to the Constitution". Brief of Appellant-Defendant,45. The Eighth Circuit rejected that argument (supra, 178) and rightly so, for the argument is meritless in many ways.

First, as the Eighth Circuit held, a punitive damages claim under Missouri law simply does not pose the threat of loss of liberty that Winship requires and so is not criminal under Winship. The absence of that threat from damages claims is, as Justice Harlan's concurring opinion points out, the reason why traditional Anglo-American concepts of due process have required no more than that such claims be proved by a preponderance of the evidence. Winship, 397 U.S. at 371-72. Second, Clayton's argument rests on two implicit premises that are plainly wrong: (a) punitive damages are solely punishment, and (b) punishment is solely the province of the criminal law. As to the first of those premises, it has already been shown that in Missouri punitive damages grew out of compensatory damages and so retained an element of compensation. Supra, Sec. IV A. And the second premise, though once advocated by Professor Greenleaf

in the 19th century, has never been accepted by either Missouri law or United States law. E.g., Buckley v. Knapp, 48 Mo. at 162 (supra, Sec. IV A); United States v. Regan, 232 U.S. 37 (1914) ("Penal actions were never yet put under the head of the criminal law"; action for civil penalty need only be proved by a preponderance even though conduct in issue was made criminal by another statute); Helvering v. Mitchell, 303 U.S. 391 (1938) (punishment may be civil or criminal); Atlas Roofing Co. v. OSHC, 430 U.S. 442 (1977) (rejecting argument that OSHA proceedings were "criminal" because fines were penal). It is perfectly proper to impose punishment in civil proceedings and, as this Court held, "even severe civil sanctions" can rest upon "proof by a preponderance of the evidence". Herman & McLean v. Huddleston, 459 U.S. 375,390 (1983), citing Regan, supra. Finally, Clayton ignores the basic precept that the beyond a reasonable

doubt standard is "unique" and peculiarly tied to the criminal law, and thus cannot be "broadly or casually" applied outside that context. Addington v. Texas, 441 U.S. 418, 428 (1979). It is no exaggeration to say that in proposing the criminalization of punitive damages (and of the various torts which can underlie punitive damages claims), Clayton proposes a revolutionary change in our jurisprudence and legal system, a change that is simply not warranted.

Clayton's question 2 is and has been stated in such a cursory manner and without supporting authority because Clayton sees no real merit in the question. That is an accurate assessment in light of the Winship line of cases and the long history in Anglo-American jurisprudence of use of the preponderance standard in damages cases. Question 2 does not present the "special and important reasons" required for a grant of certiorari.

C. Neither The Equal Protection Or Due Process Clause Requires Bifurcation Of Trials Where Punitive Damages Are Sought Or Precludes Admission Of Net Worth Evidence In Plaintiff's Case-In-Chief.

Question 3 and its bifurcation argument are an excellent example of the all too common tendency to unnecessarily constitutionalize even the simplest of procedural issues. The constitutional mandate of bifurcation that Clayton now seeks is completely unnecessary. In the first place, bifurcation is generally available for the asking in both federal and state courts. Clayton could have obtained bifurcation by requesting it under FRCP 42, and it is available upon request in Missouri's own Courts. Sec. 510.263 R.S.Mo. Clayton was not denied bifurcation because of the lack of a constitutional mandate; it simply did not think bifurcation was needed and did not request it. And in the second place, as is so clearly shown by Clayton's decision not

to request bifurcation and its agreement to admission of the net worth evidence in Plaintiff's case-in-chief, presentation of such evidence to a jury prior to its decision on liability is not a problem, let alone a problem of constitutional stature. Finally, neither the Equal Protection or Due Process Clause supports a bifurcation requirement. If the Due Process Clause did not support such a requirement in death penalty cases, e.g., McGautha v. California, 402 U.S. 182, 208-13 (1971) (and Gregg did not seem to read the Cruel and Unusual Punishment Clause as absolutely requiring bifurcation either, Gregg v. Georgia, 428 U.S. 153, 195), it certainly would not support it in punitive damages cases. Insofar as Clayton's reliance on the 14th Amendment rather than the 5th (a reliance presumably predicated on the fact that while the punitive damages claim was tried in a federal court, the claim and the jury's

decision of it rested wholly on state law) means that the proposed bifurcation requirement would reach trials in state courts as well as federal courts, there is a further obstacle to finding support for the requirement: federal-state comity. Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519 (1987). Question 3, like question 2, does not present the "special and important reasons" required for a grant of certiorari.

D. The 8th Amendment's Excessive Fines Clause Does Not Provide For Review Of The Size Of Punitive Damages Awards; In Any Event The Award In This Case Was Not Excessive.

In addition to the fact that it was never raised in the Courts below, Clayton's 8th Amendment argument suffers from two other fatal flaws. The first is that the Excessive Fines Clause does not apply to the states through the 14th Amendment (infra, subsec.1). The second is that even if it did

apply to the states, that Clause does not and should not apply to punitive damages awards (subsec. 2-4).

1. The Excessive Fines Clause Does Not Apply To The States.

While it is, of course, true that Respondent's punitive damages claim was tried in a federal court, the much more significant facts here are that the claim was stated and prosecuted under state law and that the jury's decisions regarding liability for and the amount of punitive damages were made under state law. The level of state involvement shown by those facts seems clearly sufficient to require Clayton to proceed as though this were a state case governed by the 14th Amendment's Due Process Clause. But that presents an obvious difficulty: this Court has never held that the prohibitions and protections of the 8th Amendment's Excessive Fines Clause extend to the states and their citizens through the 14th Amendment's Due Process Clause. E.g.,

Tribe, American Constitutional Law (2nd ed. 1988), 772-73. And the punitive damages issue that Clayton raises does not provide a vehicle for such an extension. For, as the following subsections show, the Excessive Fines Clause was never intended to and should not apply to punitive damages awards.

2. The Framers Had No Intention That The Excessive Fines Clause Would Provide For Judicial Review Of A Jury's Damages Awards.

As the preceding discussion of the 7th Amendment has shown, the Framers expressly limited judicial review of a jury's decisions of fact issues to the common law standards. A review of the standards extant at the time the Amendments were drafted shows clearly that the Framers had no intention or notion that the Excessive Fines Clause would provide for judicial review of a jury's damages awards - because there was no such review at that time. In the late 18th century in this country there was

neither a trial court remittitur practice or appellate review of a jury's damages awards. As Professor Wright has written (11 Wright & Miller, Federal Prac. & Proc., Sec. 2815, p.100) remittitur practice in this country goes back to Justice Story's Circuit opinion in Blunt v. Little in 1822. Blunt v. Little, 3 Fed.Cas. 760 (C.C.D.Mass. 1822). Though Justice Story's opinion thought there might have been a remittitur practice in England, this Court subsequently disavowed the Justice's reading of history. Dimick v. Schiedt, 293 U.S. 474, 483-85 (1935). Appellate review of a jury's damages award was likewise nonexistent in the late 18th century, and for long thereafter as Fraloff and the other cases cited above in Sec. III evince.

Given those facts, it is clear that the Framers did not in any way intend the Excessive Fines Clause to provide for judicial review of a jury's damages awards.

Such review was squarely at odds with the common law standards regarding civil jury trials that were expressly written into the 7th Amendment. Furthermore, all indications are that the Framers intended the 8th Amendment to apply solely to traditional criminal proceedings. E.g., In re Kemmler, 136 U.S. 436, 446-47 (1890); Weems v. United States, 217 U.S. 349 (1910); Ingraham v. Wright, 430 U.S. 651, 664-66 (1977). In sum, what Clayton's question 1 attempts to do is "wrench the Eighth Amendment from its historical context", just what this Court warned against and refused to do in Ingraham. Ingraham, 430 U.S. at 669.

3. There is No Reason To Provide For 8th Amendment Review Of Punitive Damages Awards.

To grant 8th Amendment review this Court will have to make a radical change in the law, holding either that the 8th Amendment is no longer confined to criminal matters or that a punitive damages claim is

somehow criminal in nature. Contemplation of those changes and their impact on the legal system leads directly to Ingraham's admonition against embracing "revolutionary" changes in the Amendment's reach. Ingraham, 430 U.S. at 671. In truth, there is no reason for such a change because here, as in Ingraham (430 U.S. at 670), the pertinent common law standards do (or can) provide sufficient direction and protection.

That is exemplified by Missouri's rules. They required that the amount of the award be proportioned to both Clayton's malice and Plaintiff's injury and provided the jury with information about Plaintiff's financial condition so that it could accurately gauge the extent of his injury. Furthermore, the rules required that the award also be fitted to Clayton's ability to pay and provided the jury with the net worth information needed to make that determination. Thereafter both the District Court and

Eighth Circuit followed those rules in reviewing the evidence to determine that the award had been properly proportioned to Clayton's malice and Plaintiff's injury and fairly fitted to Clayton's ability to pay. Jordan, 861 F.2d at 174-77. Clayton was and is so comfortable with Missouri's rules that it placed primary reliance on them in the Courts below and has not raised any challenge to them in this Court, even though Justice O'Connor's concurring opinion in Bankers' Life spelled out how such a challenge could be raised.

Ingraham's admonitions are well-taken; the proposed change in the 8th Amendment's reach is not warranted. Not only would Clayton's proposal violate Ingraham's warnings against "wrenching the 8th amendment from its historical context" and making "revolutionary" changes in the Amendment, it would make this Court the Court-of-Last-Resort in all punitive damages

cases. That title would undoubtedly carry with it a major increase in the cert-load and would require, in each case in which certiorari was granted, just the sort of exacting, time-consuming review of the trial record carried out by the Eighth Circuit in this case (which may explain the nearly two-year tenure of this case in the Eighth Circuit).

The better course is to do what Clayton did in the Courts below: rely on the states' common law rules. If other states have not drawn their rules as carefully and precisely as Missouri has, then the necessary changes can be made, either by state Courts or Legislatures, or if necessary, via the Due Process Clause.

4. The Punitive Damages Award Was Not Excessive Under Any Standard

Even if the 8th Amendment were to be changed to provide for review of punitive damages awards, there would still be no "special and important reason" for certior-

ari in this case, because the punitive damages award is not excessive under any standard.

Both the District Court and the Eighth Circuit carefully and closely reviewed the evidence to determine whether the punitive damages award was warranted or was excessive under Missouri's rules and both found the award warranted. Clayton does not now challenge those two reviews or the Missouri rules by which they were made. And while Clayton requests a third review -this time under the 8th Amendment - it has not even ventured to suggest how the rules for such a review would differ from Missouri's rules or would include factors not included in Missouri's rules.

Just what factors would be considered in an 8th Amendment review of a punitive damages award can be gleaned from cases in which this Court and other courts reviewed or imposed monetary sanctions akin to

punitive damages. E.g., United States v. United Mine Workers, 330 U.S. 258 (1947) ($3.5 Million in contempt sanctions); IBM v. United States, 493 F.2d 112 (2nd Cir.1973), cert. denied 416 U.S. 995 (1974). Those cases consider the monetary sanctions in light of factors such as (1) "the extent of willful and deliberate (conduct)", UMW, 303, (2) "the seriousness of the consequences of the (conduct)", id., (3) "the importance of deterring such acts in the future", id., and (4) "the amount of the defendant's financial resources", 304, or the defendant's "ability to pay", IBM, 115. Each of those factors is included in Missouri's rules. The first factor - "the extent of willful and deliberate conduct" - is the same as Missouri's rule that the award must be proportioned to the degree of malice in the defendant's conduct. E.g., Cook v. Housewirth, 254 S.W.2d 283, 286 (Mo.App. 1953) (punitive damages "are proportioned to the degree of

malice"). The second factor -"the seriousness of the consequences" - is the same as Missouri's rule that the award must be proportioned to the plaintiff's injury. E.g., Shain, supra. The third factor - "the importance of deterring such acts in the future" - is the element of deterrence which a Missouri jury (and the jury in this case, too) is adjured to consider by the instructional language regarding "deter(ring) Defendant and others from like conduct". M.A.I. 10.01; Jury Instruction 12. The final factor - "the defendant's financial resources" or "ability to pay" -is the same as Missouri's rule that the award must fit the defendant's ability to pay. E.g., Comegys, supra. And if a proportionality analysis of the type called for in Solem is needed, then that too was provided. Solem v. Helm, 463 U.S. 277, 292 (1983). The first of Solem's factors - the gravity of the offense - is covered by the foregoing discussion. The

remaining two factors - review of awards in similar cases - was provided by both the District Court and Eighth Circuit. Plaintiff cited to each Court three investment fraud cases from the Kansas City metropolitan area (Missouri and Kansas) involving similar conduct and injuries and producing punitive damages awards against brokerage firms of $250,000, $275,000 and $500,000 (plus $200,000 against a company officer). Wegerer v. First Commodity Corp., 744 F.2d 719 (10th Cir.1984) ($250,000); Kerr, supra, ($275,000); Heinen v. Lowell Listrom & Co., No. 83-1050-CV-W-8 (W.D.Mo.1985) ($500,000 against firm; $200,000 against officer). Jordan, 861 F.2d at 174; Brief of Plaintiff-Respondent, 27.

In short, Missouri's rules require consideration of each factor that might be included in an 8th Amendment review. Given that, even if 8th Amendment review were possible, it could not produce a result

different from that reached in the District Court and in the Eighth Circuit, especially when the requisite "great reliance" (UMW, 303) is placed on the District Court's decision. Thus, question 3 fails to present any "special and important reasons" for certiorari.

V. The CEA Does Not Preempt State Common Law Actions And Clayton's Attempt To Raise That Issue Does Not Provide A Ground For Certiorari.

At a time when fraud in the futures industry seems more widespread than ever and the CFTC's need for help in enforcing the laws pertaining to that industry seems greater than ever, Clayton proposes that this Court should take away much of what Congress has long deemed one of the most effective ways of providing that help - private damages actions. Though there was never any substantial basis in the legislative history for the argument that the 1974 amendment (or later amendments) of the CEA impliedly preempted state common law tort

actions, and though Courts have regularly rejected that argument, following the path through the legislative history that was broken by Judge Friendly in Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980) and by this Court in Merrill, Lynch v. Curran, 456 U.S. 353 (1982), Clayton has nonetheless raised the argument here, after eschewing it in the Courts below.

Clayton's argument does not really attempt to explain where the legislative history even suggests implied preemption of state common law actions, other than by making an allusion to the 1974 amendment. Nor does it attempt to show any conflict between state common law torts and the CEA, either by proving that "compliance with both federal and state (law) is a physical impossibility" or by proving that the "state (common) law stands as an obstacle to accomplishment and execution of the full purpose of Congress". Fidelity Fed. S. & L.

Assoc. v. Delacuesta, 458 U.S. 141, 153 (1982). Of course, Clayton makes no such attempts because the legislative history shows that Congress considered private damages actions, including those brought under state common law, to be important in "accomplishment and execution of the full purpose" of the CEA. Infra, Sec. A.

Instead Clayton merely asserts that preemption is an issue worthy of consideration here because (a) there have been "disparate resolutions" (p.13), (b) preemption is still being raised, (13-14), and (c) there is a large volume of "private" litigation over futures fraud (14-15). But not one of those assertions withstands scrutiny. Far from there being disparate resolutions, all Courts (except one Florida trial court) have reached the same resolution: the CEA preempts state regulatory statutes, but does not preempt state common-law tort actions. E.g., Kerr, supra; Kotz, supra; and see,

infra. The issue of preemption of state common law tort actions is settled and so is rarely raised anymore, as is evinced both by Clayton's decision not to raise it in the Courts below and by the dates in the long string of citations on page 12 of Clayton's Argument - the most recent cases are two years old (only three out of thirty) and the great majority are five-ten years old (it should also be noted that Clayton's citation string is egregiously padded; well over half of the cases do not deal with preemption of common law actions, but instead try to determine whether a particular statute is regulatory in nature). And if there is a substantial volume of private damages actions involving futures trading (which Clayton's statistics do not prove) that is a reflection of the prevalence of fraud in the industry and the CFTC's inability to deal with it alone.

As the next section shows, state common law tort actions were and are not preempted, because Congress deemed such private damages actions an effective means of enforcing the laws regarding the futures industry, and took care to preserve them as an aid to the CFTC. Such aid is all the more important today in light of the troubles in the markets and the increasing Congressional doubts about the CFTC's efficacy. Question 4 simply does not present any "special and important reasons" for certiorari.

A. The CEA Preserves Common Law Tort Actions.

The 1974 amendment of the CEA marked a watershed in regulation of the futures industry. Congress was confronted with the dual needs of (a) ending infighting among federal and state regulatory agencies for power over the industry, and (b) substantially strengthening regulation of the industry. It chose to meet the first need by preempting regulatory statutes (e.g., state

Securities Acts) that were being used by various agencies to assert jurisdiction over the industry, and to meet the second need by vesting exclusive regulatory jurisdiction in the new CFTC, while preserving the private damages actions which it believed so effective in helping enforce the laws pertaining to the industry. Infra.

Preemption of regulatory statutes was a response to the "growing list of proposed and actual state regulations and laws" that state agencies were using in their regulatory efforts. House Report No. 93-975, 93d Cong., 2d Sess.,48. But that was as far as preemption went. Believing private damages actions to be valuable in strengthening enforcement of laws regarding futures trading - because the actions provided industry members "a significant incentive ... to obey the law" (Curran, 384) - Congress avoided preemption of the bodies of law that created such actions, including the

states' common law, viewing such preemption as unnecessary and contrary to the purpose of strengthening enforcement. Infra.

Reference to private actions abound in the 1974 amendment's history, as Judge Friendly detailed. Id., 308-15. They began in the House, in the remarks made by Chairman Poage in introducing the amendment, 119 Cong.Rec. 41333; Leist, 308, and continued throughout proceedings in that body. Leist, 308-09. In the Senate such remarks reached a high point during discussions in Committee about the fact that the House draft of Sec. 201 of the bill might be read as preempting not only regulatory statutes, but "all Court actions". Curran, 386 (quoting Senator Clark); Leist, 314 (same). House members involved in the drafting of Sec. 201 made clear that such sweeping preemption had not been their intent. Curran, 386; Leist, 315. Other members of the House and Senate made known to the Senate Committee their opposi-

tion to preemption of court actions, a number of those members specifically referring to common law actions or proposing preemption schemes that would clearly preserve such actions, e.g., Judiciary Chairman Rodino's proposal that preemption in the futures field be the same as that in the securities field. Hearings on S. 2485, S. 2578 and H.R. 13113, p.260; Curran, 387; Leist, 314-15. As a result, the Committee added to Sec. 201 the "savings clause", which was clearly accepted as preserving both the CEA's implied cause and "other court actions", Curran, 387, including state common law tort actions. E.g., Kerr, supra; Kotz, supra; Johnson, CFTC Jurisdiction, 25 Drake L.Rev. 61, 71 (Fall 1975) (article by Phillip Johnson, first Chairman of the CFTC).

Finally, after the bill was sent to the Senate floor, where Senator Curtis pointed out that previously-enacted Sec.

4(c) - purporting to preserve "any state law" - would conflict with H.R. 13113's attempt to preempt state regulatory statutes (which is what Clayton's Argument refers to, 13), the limited scope of preemption was reiterated. 120 Cong.Rec. 30464. Only Sec. 4(c) was deleted; the savings clause that had been added to Sec. 201 of the bill to preserve "all court actions" was left in place. Id.; Johnson, 25 Drake L.Rev., 69 (deletion of 4c directed only to preemption of "state regulatory authority").

The 1978 and 1982 amendments did not see any change in the Congressional belief that the CFTC needed help in enforcing the law or in the importance given to private damages actions. "Widespread fraud" in certain areas of the industry persuaded Congress that the CFTC needed even more help, which the 1978 amendment sought to provide by allowing state agencies to bring certain types of actions. Leist, 638 F.2d at

319. That trend continued in the 1982 amendment, and in reaction to Merrill Lynch's challenge to the implied cause in the then-undecided Curran case Congress reiterated its belief in the importance of private damages actions, by expressly writing such an action into the CEA. House Rep.No. 97-565, pps.56-57, reprinted in U.S. Code Cong. & Admin. News, 97th Cong., 2d session, pps. 3905-06; Mallen, 623 F.Supp. at 204-06.

From the foregoing history of the CEA the Courts that have dealt with preemption questions have all (with the exception of the Florida trial court) reached the same result: (a) the CEA does preempt regulatory statutes, e.g., Haines v. First Comm. Corp., CCH Comm. Fut.L.Rep., Sec. 21,088 (Mass. Super.Ct. 1980); Texas v. Monex Internat'l Ltd., 527 S.W.2d 804 (Tex. Civ.App. 1975); (b) the CEA does not preempt statutes which are non-regulatory, e.g., United States v. Brien, 617 F.2d 299, 309-10

(1st Cir. 1980); Bishop v. Commodity Exchange Inc., 564 F.Supp. 1557, 1563-5 (S.D.N.Y. 1983), and (c) the CEA does not preempt state common law claims, e.g., Kerr, supra; Kotz, supra; Mallen, supra; Patry, supra; Witzel v. Chartered Systems Corp., 490 F.Supp. 343, 347-48 (D.Minn. 1980); Jones v. B.C. Christopher & Co., 466 F.Supp. 345, 347 (N.D. Ill.1977). With the exception of the Florida trial court's decision (Poncy) the cases Clayton cites on Page 13 of its Argument as evidence of disparate resolutions of preemption are not at all disparate. Haines finds a state regulatory statute to be preempted, Hunsucker does the same while noting that common law damages actions are not preempted and Kotz holds that common law damages actions are not preempted.

B. Question 4 Presents "Special And Important Reasons For Denying Certiorari.

The foregoing has shown that question 4 presents no "special and important reasons" for granting certiorari. But there are clearly special and important reasons for denying certiorari. The first can be found in the recent revelations of major criminal investigations in the Chicago and Kansas City futures markets, and also in the futures litigation figures Clayton cites in its Argument (14). What those revelations and figures show is that a problem Congress has long tried to resolve - fraud in the futures markets - is flourishing. While Clayton's perverse reasoning sees that as a ground for doing away with what Congress considered an important vehicle for enforcing the law - private damages actions - Congress would clearly not see it that way.

A second reason can also be found in the revelations of investigations and in the facts of this case: the inability of the CFTC to enforce by itself the laws relating to the futures industry. Although during the two-three year term of Clayton's plan to defraud its customers a number of those customers complained to the CFTC, nothing happened and the plan simply continued. That the CFTC does not have the resources or personnel to enforce the law by itself is nothing new; the CFTC has long admitted that, e.g., Leist, 638 F.2d at 321 (quoting CFTC's amicus brief) and, recognizing that, Congress has long provided for other means of enforcing the law, including private damages actions and help from state agencies. The legislative history of the CEA makes quite clear the importance Congress places on the availability of such other means of enforcing the law, especially

damages actions. That importance has surely increased in recent months, as Congress has become obviously dissatisfied with the CFTC.

Clayton could not have picked a worse time to reverse its earlier decision not to "press" the preemption issue. But even better timing would not make the issue certworthy, because nothing in the CEA, its legislative history or the caselaw supports preemption.

VI. Conclusion.

Certiorari is not warranted in this case and should be denied. The numerous procedural defects and defaults attributable to Clayton are, by themselves, more than ample ground for denial of certiorari. Tactical choices made by Clayton in the Courts below led it to refrain from raising or to waive three of its four questions in those Courts; now that its tactical choices have failed, it should not be allowed to undo those choices and raise questions it

earlier decided not to raise. More grounds for denial can be found when Clayton's questions are considered on their merits. The radical changes Clayton seeks in Constitutional law, tort and damages law and futures industry law are very far from necessary or needed. And the result of such changes can be seen in what is now going on in the futures industry. Even when faced with the risk of private damages actions and punitive damages - which Clayton says pose such an awful threat - the industry is rife with fraud. To restrict or do away with private damages actions or punitive damages is to weaken or kill one effective deterrent to such conduct.

Respectfully submitted,

WILLIAM C. PARTIN
MATTHEW K. PARTIN
Suite 330
1310 Carondelet Drive
Kansas City, Missouri 64114
(816) 942-7880
Counsel for Respondent
David T. Jordan

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID T. JORDAN, Plaintiff,	)	
vs.	)	Case No. 82-1107-CV-W-9
CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC.,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE

Pursuant to Federal Rule of Civil Procedure 50, defendant Clayton Brokerage Company of St. Louis, Inc. ("Clayton") hereby moves the Court to direct the jury to return a verdict in favor of Clayton and against plaintiff at the close of plaintiff's evidence. In support of its motion, Clayton states:

1. Under the law and plaintiff's evidence, plaintiff has failed to prove any facts stating a claim upon which relief can be granted against Clayton.

2. Under the law and plaintiff's evidence, plaintiff has failed to prove that Martin Rachlin was Clayton's agent to make Clayton vicariously liable for the conduct of Martin Rachlin.

3. Under the law and plaintiff's evidence, plaintiff has failed to establish that Martin Rachlin was acting within the course and scope of his employment so as to make Clayton vicariously liable for his conduct.

4. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton made misrepresentations to plaintiff concerning the manner in which his account would be traded.

5. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton intended plaintiff to rely on its alleged representations concerning the manner in which plaintiff's account would be traded.

6. Under the law and plaintiff's evidence, plaintiff has failed establish that Clayton's alleged representations to plaintiff were false.

7. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton knew the alleged representations concerning the manner in which plaintiff's account would be traded were false.

8. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton's alleged representations concerning the manner in which plaintiff's account would be traded were material.

9. Under the law and plaintiff's evidence, plaintiff has failed to establish that he relied upon Clayton's alleged representations concerning the manner in which his account would be traded.

10. Under the law and plaintiff's evidence, plaintiff has failed to establish that he was unaware that Clayton's alleged representations concerning the manner in which his account would be traded were false.

11. Under the law and plaintiff's evidence, plaintiff has failed to establish that he used ordinary care in relying on Clayton's alleged representations concerning the manner in which his account would be traded.

12. Under the law and plaintiff's evidence, plaintiff has failed to establish that he was damaged as a result of Clayton's alleged representations concerning the manner in which his account would be traded.

13. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton violated any fiduciary duty to plaintiff.

14. Under the law and plaintiff's evidence, plaintiff has failed to establish that he was damaged as a direct result of any alleged breach of fiduciary duty by Clayton.

15. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton's conduct violated 7 U.S.C. Sec. 6(b).

16. Under the law and plaintiff's evidence, plaintiff has failed to establish that any alleged violation of 7 U.S.C. Sec. 6(b) directly damaged plaintiff.

17. Under the law and plaintiff's evidence, the acts and conduct of Clayton of which plaintiff complains were ratified or adopted by plaintiff as his own.

18. Under the law and plaintiff's evidence, plaintiff's failure to properly and timely object to Clayton's

actions or conduct constitutes a waiver of his right to assert liability against Clayton.

19. Under the law and plaintiff's evidence, plaintiff has failed to establish that any act of Clayton was done with malice or reckless disregard of plaintiff's rights.

20. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton authorized the acts of Martin Rachlin with respect to the trading in plaintiff's account.

21. Under the law and plaintiff's evidence, plaintiff has failed to sustain the burden of proving that the damages claimed in plaintiff's Second Amended Complaint was a direct result of any acts or omissions by Clayton and not from some other cause for which Clayton is not liable.

22. Under the law and plaintiff's evidence, plaintiff has failed to establish the amount of damages, if any, sustained by plaintiff, and any judgment in plaintiff's favor, therefore, could be based only on guesswork, conjecture, surmise, or speculation.

23. Plaintiff's evidence in (sic) insufficient as a matter of law to meet Plaintiff's burden of proof with respect to all elements necessary for recovery under the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

24. Plaintiff's evidence is insufficient as a matter of law to support a judgment in favor of plaintiff and against Clayton on the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID T. JORDAN, Plaintiff,	)	
vs.	)	Case No. 82-1107-CV-W-9
CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC.,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR DIRECTED VERDICT
AT THE CLOSE OF ALL THE EVIDENCE

Pursuant to Federal Rule of Civil Procedure 50, defendant Clayton Brokerage Company of St. Louis, Inc. ("Clayton") hereby moves the Court to direct the jury to return a verdict in favor of Clayton and against plaintiff at the close of plaintiff's evidence. In support of its motion, Clayton states:

1. Under the law and evidence of the case, plaintiff has failed to prove any facts stating a claim upon which relief can be granted against Clayton.

2. Under the law and evidence of the case, plaintiff has failed to prove that Martin Rachlin was clayton's agent to make Clayton vicariously liable for the conduct of Martin Rachlin.

3. Under the law and evidence of the case, plaintiff has failed to establish that Martin Rachlin was acting within the course and scope of his employment so as to make Clayton vicariously liable for his conduct.

4. Under the law and evidence of the case, plaintiff has failed to establish that Clayton made misrepresentations to plaintiff concerning the manner in which his account would be traded.

5. Under the law and evidence of the case, plaintiff has failed to establish that Clayton intended plaintiff to rely on its alleged representations concerning the manner in which plaintiff's account would be traded.

6. Under the law and evidence of the case, plaintiff has failed establish that Clayton's alleged representations to plaintiff were false.

7. Under the law and evidence of the case, plaintiff has failed to establish that Clayton knew the alleged representations concerning the manner in which plaintiff's account would be traded were false.

8. Under the law and evidence of the case, plaintiff has failed to establish that Clayton's alleged representations concerning the manner in which plaintiff's account would be traded were material.

9. Under the law and evidence of the case, plaintiff has failed to establish that he relied upon Clayton's alleged representations concerning the manner in which his account would be traded.

10. Under the law and evidence of the case, plaintiff has failed to establish that he was unaware that Clayton's alleged representations concerning the manner in which his account would be traded were false.

11. Under the law and evidence of the case, plaintiff has failed to establish that he used ordinary care in relying on Clayton's alleged representations concerning the manner in which his account would be traded.

12. Under the law and evidence of the case, plaintiff has failed to establish that he was damaged as a result of Clayton's alleged representations concerning the manner in which his account would be traded.

13. Under the law and evidence of the case, plaintiff has failed to establish that Clayton violated any fiduciary duty to plaintiff.

14. Under the law and evidence of the case, plaintiff has failed to establish that he was damaged as a direct result of any alleged breach of fiduciary duty by Clayton.

15. Under the law and evidence of the case, plaintiff has failed to establish that Clayton's conduct violated 7 U.S.C. Sec. 6(b).

16. Under the law and evidence of the case, plaintiff has failed to establish that any alleged violation of 7 U.S.C. Sec. 6(b) directly damaged plaintiff.

17. Under the law and evidence of the case, the acts and conduct of Clayton of which plaintiff complains were ratified or adopted by plaintiff as his own.

18. Under the law and evidence of the case, plaintiff's failure to properly and timely object to Clayton's actions or conduct constitutes a waiver of his right to assert liability against Clayton.

19. Under the law and evidence of the case, plaintiff has failed to establish that any act of Clayton was done with malice or reckless disregard of plaintiff's rights.

20. Under the law and evidence of the case, plaintiff has failed to establish that Clayton authorized the acts of Martin Rachlin with respect to the trading in plaintiff's account.

21. Under the law and evidence of the case, plaintiff has failed to sustain the burden of proving that the damages claimed in plaintiff's Second Amended Complaint was a direct result of any acts or omissions by Clayton and not from some other cause for which Clayton is not liable.

22. Under the law and evidence of the case, plaintiff has failed to establish the amount of damages, if any, sustained by plaintiff, and any judgment in

plaintiff's favor, therefore, could be based only on guesswork, conjecture, surmise, or speculation.

23. Plaintiff's evidence in (sic) insufficient as a matter of law to meet burden of proof with respect to all elements necessary for recovery under the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

24. Plaintiff's evidence is insufficient as a matter of law to support a judgment in favor of plaintiff and against Clayton on the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID T. JORDAN, Plaintiff,	)	
vs.	)	Case No. 82-1107-CV-W-9
CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., Defendant.	)	

DEFENDANT CLAYTON BROKERAGE COMPANY-OF ST. LOUIS, INC.'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT ENTERED ON NOVEMBER 24, 1986, AND FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Pursuant to Rule 50, Federal Rules of Civil Procedure, defendant Clayton Brokerage Company of St. Louis, Inc. hereby moves the Court to set aside the verdict and judgment entered on November 24, 1986, in favor of plaintiff David T. Jordan on his claims against defendant and to enter judgment in favor of defendant in accordance with its Motion for Directed Verdict at the Close of All the Evidence. In the alternative and pursuant to Rule 59, Federal Rules of Civil Procedure, defendant moves the

Court to order a new trial of plaintiff's claims against defendant. The reasons supporting this Motion, in addition to the reasons more fully set forth in the accompanying Memorandum in Support, are as follows:

1. The Court erred in failing to sustain defendant's Motion for Directed Verdict at the Close of All the Evidence for the reasons and on the grounds set forth in said Motion.

2. The verdict finding punitive damages against defendant in the amount of $400,000.00 is excessive and contrary to the clear weight of the evidence.

3. The verdict finding punitive damages against defendant in the amount of $400,000.00 is so grossly excessive, unreasonable and unwarranted under the evidence in this case as to show that it is the result of bias or passion and prejudice on the part of the jury in favor of plaintiff and against defendant.

4. In the event the Court finds the verdict for punitive damages was excessive but not so grossly excessive as to indicate bias or passion and prejudice on the part of the jury, defendant requests the Court to require plaintiff to remit the sum of $320,000.00 or, in the alternative, that the Court grant a new trial to defendant.

5. The Court erred in giving Jury Instruction No. 8 (Verdict director -- fraud) because it was not supported by the evidence.

6. The Court erred in giving Jury Instruction No. 9 (Verdict director -- breach of fiduciary duty) because it was not supported by the evidence.

7. The Court erred in giving Jury Instruction No. 4 insofar as that instruction purported to set forth the appropriate burden of proof for punitive damages because a preponderance of the

evidence standard violates the due process clause of the 14th Amendment to the United States Constitution.

8. The Court erred in giving Jury Instruction No. 12 because plaintiff failed to make a submissible case on punitive damages and for the reasons set forth in paragraph 7 above.

9. The Court erred in allowing plaintiff to read defendant's net worth to the jury because plaintiff failed to make a submissible case on punitive damages and because it violated the Equal Protection Clause of the 14th Amendment to the United States Constitution.

10. The Court erred in not granting defendant's motion for mistrial during plaintiff's case-in-chief concerning the evidence of commissions earned in another customer's account.

11. The Court erred in admitting over defendant's objections the testimony of Beverlee Peterson, James Hanson, the records custodians from the Kansas National Bank, the United States Post Office, and the Social Security Administration, Martha LaQuey, Wayne Lieser, Waldo Wiens, Elmer Beningfield, and Ellen O'Connell to the extent that said testimony related to trading activity that had no direct bearing or relationship to the handling of plaintiff's account.

12. The Court erred in overruling defendant's objections to plaintiff's exhibits 33, 34, 37, 38, 40, 41, 42, 43, 44, 45, 46, and such other exhibits that had no direct bearing or relationship to the handling of plaintiff's account.

13. The Court erred in not sustaining defendant's objections to plaintiff's repeated use of "other bad act"

evidence because the cumulative effect of such evidence was to deny defendant a fair trial.

14. The Court erred in denying defendant's Motion in Limine concerning "other bad act" evidence.

15. The evidence established as a matter of law that plaintiff failed to prove any facts stating a claim upon which relief can be granted against Clayton.

16. The evidence was insufficient as a matter of law to prove that Martin Rachlin was Clayton's agent to make clayton vicariously liable for the conduct of Martin Rachlin.

17. The evidence was insufficient as a matter of law to establish that Martin Rachlin was acting within the course and scope of his employment so as to make Clayton vicariously liable for his conduct.

18. The evidence was insufficient as a matter of law to establish that Clayton made misrepresentations to plaintiff concerning the manner in which his account would be traded.

19. The evidence was insufficient as a matter of law to establish that Clayton intended plaintiff to rely on its alleged representations concerning the manner in which plaintiff's account would be traded.

20. The evidence was insufficient as a matter of law to establish that Clayton's alleged representations to plaintiff were false.

21. The evidence was insufficient as a matter of law to establish that Clayton knew the alleged representations concerning the manner in which plaintiff's account would be traded were false.

22. The evidence was insufficient as a matter of law to establish that Clayton's alleged representations concerning the manner in which plaintiff's account would be traded were material.

23. The evidence was insufficient as a matter of law to establish that plaintiff relied upon Clayton's alleged representations concerning the manner in which his account would be traded.

24. The evidence was insufficient as a matter of law to establish that plaintiff was unaware that Clayton's alleged representations concerning the manner in which his account would be traded were false.

25. The evidence was insufficient as a matter of law to establish that plaintiff used ordinary care in relying on Clayton's alleged representations concerning the manner in which his account would be traded.

26. The evidence was insufficient as a matter of law to establish that plaintiff was damaged as a result of Clayton's alleged representations concerning the manner in which his account would be traded.

27. The evidence was insufficient as a matter of law to establish that Clayton violated any fiduciary duty to plaintiff.

28. The evidence was insufficient as a matter of law to establish that he was damaged as a direct result of any alleged breach of fiduciary duty by Clayton.

29. The evidence was insufficient as a matter of law to establish that Clayton's conduct violated 7 U.S.C. Sec. 6(b).

30. The evidence was insufficient as a matter of law to establish that any alleged violation of 7 U.S.C. Sec. 6(b) directly damaged plaintiff.

31. The evidence established as a matter of law that the acts and conduct of Clayton of which plaintiff complains were ratified or adopted by plaintiff as his own.

32. The evidence was insufficient as a matter of law to establish that any act of Clayton was done with malice or reckless disregard of plaintiff's rights.

33. The evidence was insufficient as a matter of law to establish that Clayton authorized the acts of Martin Rachlin with respect to the trading in plaintiff's account.

34. The evidence was insufficient as a matter of law to sustain plaintiff's burden of proving that the damages claimed in plaintiff's Second Amended Complaint were a direct result of any acts or omissions by Clayton and not from some other cause for which Clayton is not liable.

35. The evidence was insufficient as a matter of law to establish the amount of damages, if any, sustained by plaintiff, and any judgment in plaintiff's favor, therefore, could be based only on guesswork, conjecture, surmise, or speculation.

36. The evidence was insufficient as a matter of law to meet plaintiff's burden of proof with respect to all elements necessary for recovery under the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

37. The evidence was insufficient as a matter of law to support a judgment in favor of plaintiff and against Clayton on the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

WHEREFORE, defendant prays the order of the Court.

Defendant requests oral argument on this Motion.

/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant
Clayton Brokerage Company of St. Louis, Inc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 87-1312-WM
DAVID T. JORDAN
Plaintiff-Appellee
v.
CLAYTON BROKERAGE CO.
OF ST. LOUIS, INC.
Defendant-Appellant
Appeal from the United States District
Court for the Western District of Missouri
Western Division

PETITION FOR REHEARING
EN BANC AND MEMORANDUM IN SUPPORT

STATEMENT REQUIRED PURSUANT TO RULE 16(d)

I express a belief, based on a reasoned and studied professional judgment, that the decision filed in this case on October 17, 1988, is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: Morrissey v. Welsh Co., 821 F.2d 1294 (8th Cir.1987) and Morrill v. Becton, Dickinson & Co., 747 F.2d 1217 (8th Cir. 1984).

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1. Whether the award of $400,000.00 in punitive damages, which is more than fifty (50) times the award of $7,923.50 in actual damages, is grossly excessive, lacks any correlation to the injury inflicted or the cause thereof, and therefore must be remitted.

2. Whether appellant Clayton's rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution were violated by: (a) the imposition of punitive damages in an amount calculated on the basis of appellant Clayton's net worth and in the absence of any objective standard, (b) by the admission in evidence of Clayton's net worth on the issue of the amount of punitive damages to be awarded,

and (c) the imposition of punitive damages based on a jury instruction allowing punitive damages to be awarded on a mere "preponderance of evidence" standard rather than a "proof beyond a reasonable doubt" standard.

PETITION FOR REHEARING EN BANC

Clayton Brokerage company of St. Louis, Inc. ("Clayton") hereby petitions the Court pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Rule 16 of the Eighth Circuit Rules of Appellate Procedure, for a rehearing en banc. The decision of the panel in this case is contrary to other decisions of this Court, thus requiring a hearing by the full Court to secure a uniformity of decisions. In addition, this appeal raises questions of exceptional importance not only to Clayton but to all defendants and potential defendants faced with unlimited claims for

punitive damages. Specifically, a rehearing en banc should be granted for the following reasons:

1. The panel's decision in this case is contrary to the prior decisions of this Court in Morrissey v. Welsh Co., 821 F.2d 1294 (8th Cir.1987) and Morrill v. Becton, Dickinson & Co., 747 F.2d 1217 (8th Cir.1984) and to prior decisions of the appellate courts of Missouri. The decision improperly permits a $400,000 punitive damages award, which was in excess of 50 times the actual damages award, to stand. That award was grossly excessive as a matter of law and lacked the requisite correlation to the injury inflicted and the cause thereof. As ably set forth in the dissenting opinion of Senior Circuit Judge Ross, the punitive damages award in this case should have been significantly reduced by remittitur.

2. The panel's decision improperly sanctions the violation of Clayton's Constitutional rights. Clayton's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution were violated by a jury instruction on punitive damages which required only a preponderance of the evidence and not proof beyond a reasonable doubt. Additionally, those rights were violated by the erroneous admission of net worth evidence. Such evidence erroneously implied to the jury that it was more appropriate to punish Clayton than other persons under similar circumstances who had lesser net worth. Moreover, the jury was given no standard whatsoever to use in its consideration of such evidence.

/s/ John W. Cowden
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant

IN THE CIRCUIT COURT OF JACKSON COUNTY, MO.
AT KANSAS CITY

ELLEN O'CONNELL, Plaintiff,	)	
vs.	)	No. CV85-12755
CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., Defendant.	)	

MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, TO DISMISS THE PETITION

Comes now Clayton Brokerage Company of St. Louis, Inc. ("Clayton") and moves, in the alternative, that the Court reconsider its Order denying Clayton's motion for summary judgment, or that the Court dismiss the Petition for failure to state a claim upon which relief can be granted.

As grounds for reconsideration, Clayton submits that the Court erred, as a matter of law, in concluding that the dismissal of Plaintiff's reparation complaint was for failure to prosecute, rather than for limitations. Furthermore, even assuming that the dismissal was based on Plaintiff's failure to prosecute, the

dismissal bars Plaintiff's claims, since it is not stated to be a dismissal without prejudice.

As grounds for its motion to dismiss, Clayton submits that Section 4b of the Commodity Exchange Act, 7 U.S.C. Sec. 6b, preempts state law that would otherwise govern the conduct alleged in the Petition. Consequently, the Petition fails to state a claim upon which relief can be granted.

Wherefore, Clayton Brokerage Co. of St. Louis, Inc. respectfully requests that this Court enter its order granting summary judgment in favor of Clayton or, alternatively, dismissing the Petition, with prejudice, for failure to state a claim upon which relief can be granted.

THOMPSON & MITCHELL
/s/ Kenton E. Knickmeyer
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID T. JORDAN, Plaintiff,	)	
vs.	)	Case No. 82-1107-CV-W-9
CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., and MARTIN M. RACHLIN, Defendants.	)	

SEPARATE ANSWER OF DEFENDANT CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC. TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant Clayton Brokerage Company of St. Louis, Inc. (hereinafter "Clayton Brokerage"), for its separate answer to plaintiff's Second Amended Complaint, states:

1. Clayton Brokerage is without sufficient information to form a belief as to the truth or accuracy of the averments contained in paragraph 1 of plaintiff's Second Amended Complaint.

2. Admits that it is a Missouri corporation engaged in the business of operating a brokerage house in order to trade in the commodities future market, and

that it maintains an office in Kansas City, Jackson County, Missouri, but denies each and every other averment contained in paragraph 2 of plaintiff's Second Amended Complaint.

3. Admits that Martin Rachlin was employed by Clayton Brokerage as manager and as a broker in the Kansas City offices, but is without sufficient information to form a belief as to the truth or accuracy of the other averments contained in paragraph 3 of plaintiff's Second Amended Complaint, and therefore denies the same.

4. Admits that Martin Rachlin acted as a registered commodity representative while employed by Clayton Brokerage, but specifically denies that his actions were not diligently supervised by Clayton Brokerage, and denies each and every other averment contained in paragraph 4 of plaintiff's Second Amended Complaint.

5. Denies each and every averment contained in paragraphs 5, 6, 7, 8, and 9 of plaintiff's Second Amended Complaint.

6. Denies each and every averment contained in the General Allegations of plaintiff's Second Amended Complaint not specifically admitted herein.

COUNT I

7. Incorporates herein by reference its answers to paragraph 1 through 9, inclusive, of plaintiff's Second Amended Complaint.

8. Denies each and every averment contained in paragraph 11 through 19, inclusive, of plaintiff's Second Amended Complaint.

9. Denies each and every averment contained in Count I of plaintiff's Second Amended Complaint not specifically admitted herein.

10. Further answering, Clayton Brokerage states that Count I of plaintiff's Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

11. Further answering, Clayton Brokerage states that Count I of plaintiff's Second Amended Complaint is barred because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

12. Further answering, Clayton Brokerage states that plaintiff waived the action alleged in Count I of plaintiff's Second Amended Complaint.

13. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

14. Further answering, Clayton Brokerage states that Count I of plaintiff's Second Amended Complaint is barred by the doctrine of laches.

15. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count I of plaintiff's Second Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count I of plaintiff's Second Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT II

16. No answer is required for Count III because it has been dismissed from this case.

COUNT III

17. Incorporates herein by reference its answers to paragraphs 1 through 24, inclusive, of plaintiff's Second Amended Complaint.

18. Denies each and every averment contained in paragraphs 26 through 28, inclusive, of plaintiff's Second Amended Complaint.

19. Denies each and every averment contained in Count III of plaintiff's Second Amended Complaint not specifically admitted herein.

20. Further answering, Clayton Brokerage states that Count III of plaintiff's Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

21. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count III of plaintiff's Second Amended Complaint.

22. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

23. Further answering, Clayton Brokerage states that Count III of plaintiff's Second Amended Complaint is barred by the doctrine of laches.

24. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count III of plaintiff's Second Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count III of plaintiff's Second Amended Complaint

be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT IV

25. Incorporates herein by reference its answers to paragraphs 1 through 28, inclusive, of plaintiff's Second Amended Complaint.

26. Denies each and every averment contained in paragraphs 30 through 36, inclusive, of plaintiff's Second Amended Complaint.

27. Denies each and every averment contained in Count IV of plaintiff's Second Amended Complaint not specifically admitted herein.

28. Further answering, Clayton Brokerage states that Count IV of plaintiff's Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

29. Further answering, Rachlin states that Count IV of plaintiff's Second Amended Complaint is barred because of this defendant's good faith and diligence in the conduct of its affairs with plaintiff.

30. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count IV of plaintiff's Second Amended Complaint.

31. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claims against this defendant because all of defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

32. Further answering, Clayton Brokerage states that Count IV of plaintiff's Second Amended Complaint is barred by the doctrine of laches.

33. Further answering, Rachlin states that if plaintiff sustained the losses alleged in Count IV of plaintiff's

Second Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count IV of Plaintiff's Second Amended Complaint be dismissed and for its costs herein expended and incurred.

/s/ Michael C. Manning
/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID T. JORDAN, Plaintiff,	)	
vs.	)	Case No. 82-1107-CV-W-9
CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., and MARTIN M. RACHLIN, Defendants.	)	

FIRST AMENDED ANSWER OF DEFENDANT CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC. TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Clayton Brokerage Company of St. Louis, Inc. (hereinafter "Clayton Brokerage"), for its first amended answer to plaintiff's First Amended Complaint, states and alleges as follows:

1. Clayton Brokerage is without sufficient information to form a belief as to the truth or accuracy of the averments contained in paragraph 1 of plaintiff's First Amended Complaint.

2. Admits that it is a Missouri corporation engaged in the business of operating a brokerage house in order to trade in the commodities future market, and

that it maintains an office in Kansas City, Jackson County, Missouri, but denies each and every other averment contained in paragraph 2 of plaintiff's First Amended Complaint.

3. Admits that Martin Rachlin was employed by Clayton Brokerage as manager and as a broker in the Kansas City offices, but is without sufficient information to form a belief as to the truth or accuracy of the other averments contained in paragraph 3 of plaintiff's First Amended Complaint, and therefore denies the same.

4. Admits that Martin Rachlin acted as a registered commodity representative while employed by Clayton Brokerage, but specifically denies that his actions were not diligently supervised by Clayton Brokerage, and denies each and every other averment contained in paragraph 4 of plaintiff's First Amended Complaint.

5. Denies the averments contained in paragraphs 5, 6 and 7 of the plaintiff's First Amended Complaint.

6. Denies each and every averment contained in paragraphs 8 and 9 of Plaintiff's First Amended Complaint.

7. Denies each and every averment contained in the General Allegations of plaintiff's First Amended Complaint not specifically admitted or denied herein.

COUNT I

8. Incorporates herein by reference its answers to paragraph 1 through 9, inclusive, of plaintiff's First Amended Complaint.

9. Denies each and every averment contained in paragraph 11 through 19, inclusive, of plaintiff's First Amended Complaint.

10. Denies each and every averment contained in Count I of plaintiff's First Amended Complaint not specifically admitted or denied herein.

11. Further answering, Clayton Brokerage states that Count I of Plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

12. Further answering, Clayton Brokerage states that Count I of plaintiff's First Amended Complaint is barred because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

13. Further answering, Clayton Brokerage states that plaintiff waived the action alleged in Count I of plaintiff's First Amended Complaint.

14. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's

acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

15. Further answering, Clayton Brokerage states that Count I of plaintiff's First Amended Complaint is barred by the doctrine of laches.

16. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count I of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count I of plaintiff's First Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT II

17. Incorporates herein by reference its answers to paragraphs 1 through 19, inclusive, of plaintiff's First Amended Complaint.

18. Denies each and every averment contained in paragraphs 21 through 24, inclusive, of plaintiff's First Amended Complaint

19. Denies each and every averment contained in Count II of plaintiff's First Amended Complaint not specifically admitted or denied herein.

20. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

21. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint is barred

because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

22. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count II of plaintiff's First Amended Complaint.

23. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

24. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint is barred by the doctrine of laches.

25. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count II of plaintiff's First Amended Complaint, which this

defendant specifically denies, then plaintiff failed and refused to undertake such action as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count II of plaintiff's First Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT III

26. Incorporates herein by reference its answers to paragraphs 1 through 24, inclusive, of plaintiff's First Amended Complaint.

27. Denies each and every averment contained in paragraphs 26 through 28, inclusive, of plaintiff's First Amended Complaint.

28. Denies each and every averment contained in Count III of plaintiff's First Amended Complaint not specifically admitted or denied herein.

29. Further answering, Clayton Brokerage states that Count III of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

30. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count III of plaintiff's First Amended Complaint.

31. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

32. Further answering, Clayton Brokerage states that Count III of plaintiff's First Amended Complaint is barred by the doctrine of laches.

33. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count III of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count III of plaintiff's First Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT IV

34. Incorporates herein by reference its answers to paragraphs 1 through 28, inclusive, of plaintiff's First Amended Complaint.

35. Denies each and every averment contained in paragraphs 30 through 36, inclusive, of plaintiff's First Amended Complaint.

36. Denies each and every averment contained in Count IV of plaintiff's First Amended Complaint not specifically admitted or denied herein.

37. Further answering, Clayton Brokerage states that Count IV of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

38. Further answering, Rachlin states that Count IV of plaintiff's First Amended Complaint is barred because of this defendant's good faith and diligence in the conduct of its affairs with plaintiff.

39. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count IV of plaintiff's First Amended Complaint.

40. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claims against this

defendant because all of defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

41. Further answering, Clayton Brokerage states that Count IV of plaintiff's First Amended Complaint is barred by the doctrine of laches.

42. Further answering, Rachlin states that if plaintiff sustained the losses alleged in Count IV of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count IV of Plaintiff's First Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

/s/ Michael C. Manning
/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDE, Attorneys for Defendant Clayton Brokerage

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID T. JORDAN, Plaintiff,	)	
vs.	)	Case No. 82-1107-CV-W-9
CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., and MARTIN M. RACHLIN, Defendants.	)	

SEPARATE ANSWER OF DEFENDANT CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC. TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Clayton Brokerage Company of St. Louis, Inc. (hereinafter "Clayton Brokerage"), for its first amended answer to plaintiff's First Amended Complaint, states and alleges as follows:

1. Clayton Brokerage is without sufficient information to form a belief as to the truth or accuracy of the averments contained in paragraph 1 of plaintiff's First Amended Complaint.

2. Admits that it is a Missouri corporation engaged in the business of operating a brokerage house in order to

trade in the commodities future market, and that it maintains an office in Kansas City, Jackson County, Missouri, but denies each and every other averment contained in paragraph 2 of plaintiff's First Amended Complaint.

3. Admits that Martin Rachlin was employed by Clayton Brokerage as manager and as a broker in the Kansas City offices, but is without sufficient information to form a belief as to the truth or accuracy of the other averments contained in paragraph 3 of plaintiff's First Amended Complaint, and therefore denies the same.

4. Admits that Martin Rachlin acted as a registered commodity representative while employed by Clayton Brokerage, but specifically denies that his actions were not diligently supervised by Clayton Brokerage, and denies each and every other averment contained in paragraph 4 of plaintiff's First Amended Complaint.

5. Denies the averments contained in paragraphs 5, 6 and 7 of the plaintiff's First Amended Complaint.

6. Denies each and every averment contained in paragraphs 8 and 9 of Plaintiff's First Amended Complaint.

7. Denies each and every averment contained in the General Allegations of plaintiff's First Amended Complaint not specifically admitted or denied herein.

COUNT I

8. Incorporates herein by reference its answers to paragraph 1 through 9, inclusive, of plaintiff's First Amended Complaint.

9. Denies each and every averment contained in paragraph 11 through 19, inclusive, of plaintiff's First Amended Complaint.

10. Denies each and every averment contained in Count I of plaintiff's First Amended Complaint not specifically admitted or denied herein.

11. Further answering, Clayton Brokerage states that Count I of Plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

12. Further answering, Clayton Brokerage states that Count I of plaintiff's First Amended Complaint is barred because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

13. Further answering, Clayton Brokerage states that plaintiff waived the action alleged in Count I of plaintiff's First Amended Complaint.

14. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's

acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

15. Further answering, Clayton Brokerage states that Count I of plaintiff's First Amended Complaint is barred by the doctrine of laches.

16. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count I of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count I of plaintiff's First Amended Complaint be dismissed and for its costs herein expended and incurred.

COUNT II

17. Incorporates herein by reference its answers to paragraphs 1 through 19, inclusive, of plaintiff's First Amended Complaint.

18. Denies each and every averment contained in paragraphs 21 through 24, inclusive, of plaintiff's First Amended Complaint

19. Denies each and every averment contained in Count II of plaintiff's First Amended Complaint not specifically admitted or denied herein.

20. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

21. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint is barred

because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

22. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count II of plaintiff's First Amended Complaint.

23. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

24. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint is barred by the doctrine of laches.

25. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count II of plaintiff's First Amended Complaint, which this

defendant specifically denies, then plaintiff failed and refused to undertake such action as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count II of plaintiff's First Amended Complaint be dismissed and for its costs herein expended and incurred.

COUNT III

26. Incorporates herein by reference its answers to paragraphs 1 through 24, inclusive, of plaintiff's First Amended Complaint.

27. Denies each and every averment contained in paragraphs 26 through 28, inclusive, of plaintiff's First Amended Complaint.

28. Denies each and every averment contained in Count III of plaintiff's First Amended Complaint not specifically admitted or denied herein.

29. Further answering, Clayton Brokerage states that Count III of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

30. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count III of plaintiff's First Amended Complaint.

31. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

32. Further answering, Clayton Brokerage states that Count III of plaintiff's First Amended Complaint is barred by the doctrine of laches.

33. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count III of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count III of plaintiff's First Amended Complaint be dismissed and for its costs herein expended and incurred.

COUNT IV

34. Incorporates herein by reference its answers to paragraphs 1 through 28, inclusive, of plaintiff's First Amended Complaint.

35. Denies each and every averment contained in paragraphs 30 through 36, inclusive, of plaintiff's First Amended Complaint.

36. Denies each and every averment contained in Count IV of plaintiff's First Amended Complaint not specifically admitted or denied herein.

37. Further answering, Clayton Brokerage states that Count IV of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

38. Further answering, Rachlin states that Count IV of plaintiff's First Amended Complaint is barred because of this defendant's good faith and diligence in the conduct of its affairs with plaintiff.

39. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count IV of plaintiff's First Amended Complaint.

40. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claims against this

defendant because all of defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

41. Further answering, Clayton Brokerage states that Count IV of plaintiff's First Amended Complaint is barred by the doctrine of laches.

42. Further answering, Rachlin states that if plaintiff sustained the losses alleged in Count IV of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count IV of Plaintiff's First Amended Complaint be dismissed and for its costs herein expended and incurred.

/s/ Michael C. Manning
/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDE, Attorneys for Defendant Clayton Brokerage Company of St. Louis, Inc.

TRANSCRIPT
(p. 972, line 11 - p. 976)

THE COURT: Any objection if they read those portions of Exhibit 48?

MR. COWDEN: Yes, Your Honor. First of all, we object to reading any portion of the consolidated statement of financial condition of Clayton for the reason that our position is that a submissible case on punitive damages has not been made.

If the Court determines that a submissible case on punitive damages has been made, then we object to any reference to the total assets and total liabilities of the company.

Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury. We would object to any reference to any other figure or wording on the consolidated statement of financial condition. Specific-

ally, we object to plaintiff's proposed reading of the contingent liabilities paragraph.

I don't -- that is one that I don't believe there is any support whatsoever in the case law for allowing plaintiff's counsel to read such a statement to the jury concerning contingent liabilities, the opinion of management, based upon consultation with their outside counsel about contingent cases which are not identified specifically and it would lead to -- could lead to defendant having to put on evidence about, I suppose about every other contingent liability in the form of a legal action that is presently pending against the company to explain what was meant by that statement, and the basis for that statement.

Of course, it is hearsay and an opinion contained within a hearsay statement. So our position is, even if punitive is submissible under the law of Missouri,

and the law and practice of the 8th Circuit, that only one figure, that of total stockholders' equity should be ready to the jury.

THE COURT: What authority do you have that, Mr. Partin, that would authorize you to read the total assets and the total liabilities?

MR. MATTHEW PARTIN: Well, I think --

THE COURT: And the stockholders' equity?

MR. MATTHEW PARTIN: Well, we got some cases in the supplemental trial brief we filed, Judge, Missouri cases, in which the Missouri Supreme Court -- let me start all over again.

There is one case cited in the supplemental trial brief called Haswell versus -- I think it is Liberty Mutual. It is 557 SW 2nd something something. It is a Missouri Supreme Court decision from the '70's, in which the plaintiff's counsel in

that case made an argument to the effect that the defendant's total assets are, and gave the figure, I suggest you make an award equal to, and then proposed a percentage figure of the total assets.

We don't propose to make that kind of argument, but I think the case is authority for the proposition that asset figures even by themselves could come in. Here, we are simply offering them to show how the $17 million figure was derived. I think that is within the authority of the line of cases that of course allow evidence of net worth.

We are simply showing the components that give rise to the net worth by reading the assets and the liability figures. If we are just reading one or the other, I suppose that might be a different matter, although in light of the Haswell case, I am not sure of that. But what we are doing here is simply showing how the net worth figure is arrived at.

As for the contingent liabilities paragraph, I don't know of any case in Missouri -- well, I should say I don't know of any reported appellate opinion in Missouri in which this issue has come up. We simply propose to read that there has been evidence in this case there are pending lawsuits against Clayton involving Mr. Rachlin and his activities in the accounts of other customers.

This is just really a subject that is unexplored in the case law, I think. It is conceivable to me that in a situation like this the jury might wonder about the effect of the pendency of the other lawsuits on the financial condition, more particularly on the ability to pay of the defendant.

So that paragraph is directed to that concern. I guess what I am saying in essence is, the paragraph is further indication beyond the numbers that we are going to

read of the ability of the defendant to pay a punitive damages award, which of course under Missouri law is the only reason for offering this type of evidence, to show an ability to pay.

MR. COWDEN: The only thing further, as the Court knows, the purpose of punitive damages is two-fold: Number one, to deter future conduct by this defendant or by others in a similar position.

Number two, to punish this defendant for acts that have occurred if the jury sees fit. In determining whether to punish, there is one figure on this exhibit that is relevant, and that is the net stockholders' equity. That is that amount of money that would be available to pay to either this plaintiff or anybody else at this point in time. So that is the figure that is relevant on the defendant's ability to pay and with respect to the issue of possible punishment.

I believe that is the traditional way in which corporations' net equity is shown to the jury is to read this one figure, to advise the jury the total of the stockholders' equity of Clayton Brokerage Company is, and then to quote the figure. It is up to plaintiff's counsel, I suppose, in closing argument if he so sees fit to advise the jury as to how they are supposed to use that number, if at all.

I think it would be very confusing to the jury if they are given a figure of $46,737,713 in total assets, and they are given a liability figure, and then they are given a total net stockholders' equity figure.

THE COURT: I agree with you. I think net worth is the only dollar figure under the circumstances of the information available here, that should be read to the jury.

MR. MATTHEW PARTIN: That concludes the plaintiff's reading of the deposition.

THE COURT: Anything further?

MR. WILLIAM PARTIN: At this time I would like to read from Plaintiff's Exhibit 48, Consolidated Statement of Financial Condition on January 31, 1985 of Clayton Brokerage Company of St. Louis, Incorporated; that the net worth or total stockholders' equity as it is referred to on this exhibit of Clayton Brokerage Company at that date was $17,491,724.

THE COURT: Anything further, Mr. Partin?

MR. WILLIAM PARTIN: Your Honor, as we told you earlier in the afternoon, there may be some other exhibits that were identified that might need to be offered. I will need a moment to look at them. I will need more than a moment.

TRANSCRIPT

(p. 1062, Line 10 - p. 1063, line 5;
Complete Statement Of Clayton's Net
Worth Objection In Instruction Conference)

The equal protection of the law clause comes into play because plaintiff has placed before the jury a figure which represents defendant Clayton's shareholders' equity or net worth, which was something in excess of $17 million. It is anticipated that plaintiff's counsel will argue in his closing argument that the jury should consider the net worth of the defendant in deciding whether to punish the defendant.

Therefore, the argument will be that because this defendant has a certain amount of financial wealth, or put in another way, a certain net worth, that it is more appropriate to punish this defendant than it would be to punish another defendant under similar circumstances who has a net worth that is less than this defendant's.

Therefore simply because this defendant has a certain net worth which is before the jury, it is subject to possible punishment, whereas another defendant with a smaller net worth would not be subject to the same punishment.

THE COURT: Anything further?

MR. COWDEN: No, Your Honor.

TRANSCRIPT

(p. 1097, line 18 - p. 1098, line 3;
Plaintiff's Closing Argument Re Net Worth)

How much should you give in punitive damages? Basically, that is up to you. When we brought this suit, we had to name a figure. We did. We said $1,600,000.

Here are some guidelines; David Jordan was worth $100,000 when Clayton did this to him. You heard Mr. Baty read that from his application. $100,000 was Mr. Jordan's net worth, his life savings.

Clayton took $8,000 of that from him. Well, that is eight percent of his net worth. Clayton is worth about $17,500,000. But if you took eight percent from Clayton, that would be $1,400,000.

BRIEF OF APPELLANT-DEFENDANT CLAYTON BROKERAGE COMPANY

Pps. 45-56; Complete Discussion of Equal Protection/Net Worth Issue

Counsel also argued at the instruction conference that the Equal Protection Clause of the Fourteenth Amendment to the Constitution was violated because plaintiff informed the jury of Clayton's net worth which evidence was objected to as well. (T. 971-984; 1062-1063). This information and plaintiff's argument in relation thereto implied that it would be more appropriate to punish Clayton than another defendant under similar circumstances who had a lesser net worth.